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Supreme Court, U.S.
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In The

Supreme Court of the United States

NANCY J. ROQUET and CORETTA ROBINSON,

Petitioners,

v.

ARTHUR ANDERSEN LLP,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Seventh Circuit erred in holding that an employer does not violate 29 U.S.C. § 2102 (WARN Act) when it fails to give notice to its employees of an impending mass layoff when the reason for the mass layoff only becomes reasonably foreseeable less than sixty days before the layoff is due to begin.

2. Whether the Seventh Circuit erred in holding that an employer does not violate 29 U.S.C. § 2102 (WARN Act) when it gives its employees notice of a mass layoff only after it has decided which employees are subject to the layoff rather than at the time the need for the layoff first becomes reasonably foreseeable.

3. Whether the Seventh Circuit erred in holding that an employer does not have to pay its employees back pay and benefits as mandated by § 2104 of the WARN Act when the employer chooses to delay giving notice to its employees of an impending mass layoff due to concern that the act of giving notice will precipitate the business losses that will necessitate the mass layoff.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Nancy J. Roquet and Coretta Robinson, on their own behalf and on behalf of all others similarly situated, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The text of the opinion of the United States Court of Appeals for the Seventh Circuit is reprinted in Appendix A. (Pet. App. 1-16) Its official citation is *Roquet v. Arthur Andersen LLP,* 398 F.3d 595 (7th Cir. 2005). The text of the order of the court of appeals denying plaintiffs' petition for rehearing is attached as Appendix C. (Pet. App. 33) It is reported as *Roquet v. Arthur Andersen LLP*, 2005 U.S. App. LEXIS 5388 (7th Cir. 2005). The text of the opinion of the United States District Court for the Northern District of Illinois is reprinted in Appendix B. (Pet. App. 17-32) It is reported as *Roquet v. Arthur Andersen LLP*, 2004 U.S. Dist. LEXIS 5150 (N.D. Ill. 2004).

JURISDICTION

The judgment entered by the court of appeals was entered on February 9, 2005. On April 1, 2005, the court of appeals denied plaintiffs' petition for rehearing. This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1).

STATUTES, REGULATIONS AND RULES INVOLVED

The text of the Worker Adjustment and Retraining Notification Act ("WARN" or "the Act"), 29 U.S.C. §§ 2101-2109 is set forth in Appendix D to this Petition. (Pet. App. 34-44) The text of WARN Act regulations, 20 C.F.R. §§ 639.1-639.10, issued by the Department of Labor is set forth in Appendix E to this Petition. (Pet. App. 45-72)

STATEMENT OF THE CASE

Petitioners brought this action against Arthur Andersen LLP ("Andersen") in the United States District Court for the Northern District of Illinois. They alleged that Andersen had violated the WARN Act when it terminated much of its workforce in April 2002 in the wake of the Department of Justice indictment without the sixty days notice or benefits required by the Act. The district court had jurisdiction pursuant to 29 U.S.C. § 2104(a)(5) (WARN Act), 28 U.S.C. § 1331 (general federal question), and 28 U.S.C. § 1337 (interstate commerce).

A. Factual Background

In the Spring of 2002, Andersen was engaged in the business of accounting, auditing, and specialty consulting in various locations in the United States. On February 22, 2002, the Department of Justice (DOJ) notified Andersen that it was highly probable that it would be indicted for obstruction of justice in connection with the Enron debacle. Beginning on February 23, 2002, Andersen began an intensive effort to convince the DOJ not to bring an indictment. That effort was unavailing. On March 1, 2002,

the DOJ formally notified Andersen that it intended to seek an indictment. On March 7, 2002, the DOJ filed, and on March 14, 2002, unsealed an indictment against Andersen. On April 8, 2002, Andersen began giving notice to employees at its Illinois work sites that it was initiating a reduction in force beginning April 23, 2002. Approximately one thousand Illinois employees were terminated without receiving the notice or benefits required by the WARN Act.

B. Proceedings Below

Andersen moved for summary judgment, arguing that it was excused from complying with the WARN Act's sixty day notice requirement by the Act's "unforeseen business circumstances" exception. The "unforeseen business circumstances" exception excuses an employer from giving sixty days notice of a mass layoff if the mass layoff "is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required." 29 U.S.C. § 2102(b)(2)(A). (Pet. App. 37)

The district court granted Andersen's motion. (Pet. App. 17-32) Petitioners appealed to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit, in a 2-1 decision, affirmed the district court's ruling. (Pet. App. 1-16) The Seventh Circuit subsequently denied a petition by petitioners for rehearing *en banc*. (Pet. App. 33)

In affirming the district court's award of summary judgment in favor of Andersen, the appeals court majority held that the DOJ indictment and its deleterious consequences were not reasonably foreseeable on February 22, 2002, sixty days before the first layoff on April 23, 2002. The majority held that although the indictment was reasonably

foreseeable on March 1, 2002, the date the DOJ officially notified Andersen that it intended to seek an indictment, Andersen was not required to give its employees notice of the impending mass layoff until April 8, 2002, the date by which Andersen had decided which employees were to be terminated and began giving notice to those employees.

REASONS FOR GRANTING THE PETITION

This Court has overturned Andersen's conviction for obstruction of justice in the Enron case. But for Andersen, the Court's ruling, like the original trial and any verdict at any future trial, does not as a practical matter mean much. Andersen was destroyed the moment the indictment was unsealed on March 14, 2002. No exoneration at trial and no ruling by this Court will cause it to rise, Lazarus-like, from the dead.

This case involves Andersen's treatment of its employees once indictment became a foreseeable reality. The WARN Act requires an employer to give its employees at lest sixty days notice of an impending plant closing or mass layoff. In Illinois, home of Andersen's international headquarters, some one thousand Andersen employees were not given the notice or the benefits mandated by the Act. Notwithstanding, the court of appeals majority held that Andersen was exempt from liability under the Act – effectively gutting a major employee protection statute and creating a conflict with at least one other circuit.

This Court has never interpreted the Act's unforeseen business circumstances exception, the provision of the Act relied upon by the court of appeals to exempt Andersen from liability. The importance of the WARN Act to the

thousands of employees who lose their jobs every year due to plant closings and mass layoffs warrants this Court's taking this case and resolving the conflict between the Seventh and Eighth Circuits in the interpretation of the Act.

I. THE APPEALS COURT MAJORITY ERRED IN HOLDING THAT ANDERSEN WAS NOT REQUIRED TO PROVIDE THE NOTICE AND BENEFITS REQUIRED BY THE WARN ACT AFTER THE LAYOFFS BECAME REASONABLY FORESEEABLE

A. The WARN Act

The WARN Act was enacted by Congress to protect workers and their families and communities from the deleterious effects of sudden mass layoffs or plant closings as those are defined by the Act. 20 C.F.R. § 639.1. (Pet. App. 45) The Act requires employers to provide their employees with notice of termination sixty days in advance of a mass layoff or plant closing. *Id.* Advance notice of a mass layoff or plant closing provides workers and their families time to adjust to the prospective job loss, to find new employment, and, if necessary, to obtain retaining. *Id.* Advance notice also provides the affected employees with continuation of wages and employment benefits during the required notice period.

The Act exempts employers from providing the required notice under certain circumstances. Of relevance here is § 2102(b)(2)(A) of the Act which provides that:

> An employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business

> circumstances that were not reasonably foreseeable as of the time that notice would have been required.

29 U.S.C. § 2102(b)(2)(A). (Pet. App. 37)

Department of Labor regulations state that "An important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control." 20 C.F.R. § 639.9(b)(1). (Pet. App. 69-70) The regulations further state that "The test for determining when business circumstances are not reasonably foreseeable focuses on an employer's business judgment. The employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of a particular market." 20 C.F.R. § 639.9(b)(2). (Pet. App. 69-70)

The Act also provides that an "employer relying on [unforeseen business circumstances exception] shall give as much notice as is practicable and at that time shall give a brief statement of the basis for reducing the notification period." 29 U.S.C. § 2102(b)(3). (Pet. App. 38) Pursuant to 29 U.S.C. § 2104(a)(1), employees are entitled to back pay and benefits for each day that an employer violates the notice requirement. (Pet. App. 40)

B. If Layoffs Become Reasonably Foreseeable During The Sixty Day Period The Notice Time Is Reduced, Not Eliminated

The majority held that the unsealing of the federal indictment of Andersen for obstruction of justice arising out of its shredding of documents in connection with its work